

STATE OF MICHIGAN
COURT OF APPEALS

VICKIE ANN TIMOFF,

Plaintiff-Appellee,

v

HERBERT JAMES TIMOFF,

Defendant-Appellant.

UNPUBLISHED
October 20, 2000

No. 213704
Oakland Circuit Court
LC No. 97-539461-DM

Before: Owens, P.J., and Jansen and R.B. Burns*, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We affirm, but remand for an evidentiary hearing to determine the reasonableness of attorney fees awarded to plaintiff.

On appeal, defendant argues that the trial court erred in finding that money defendant received from his father to purchase commercial property was a gift to both parties rather than a loan. We disagree. Findings of fact will not be reversed unless clearly erroneous. *McMichael v McMichael*, 217 Mich App 723, 728-729; 552 NW2d 688 (1996). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* at 729.

Defendant and his parents entered into a loan agreement when defendant obtained over \$190,000 to begin his business in 1989. Both defendant and his father, George, testified that the money was a loan that was expected to be repaid, and not merely a gift. However, George testified that the last loan payment was made in October 1991. The trial court determined that defendant's and George's testimony was not credible and further found that defendant's failure to make payments in over six years indicated that the loan had metamorphosed into a gift to the parties "so that they could maintain a livelihood" and that "there is no longer an expectation of repayment." After reviewing the record, we are not left with the definite and firm conviction that a mistake has been made. The trial court, as the trier of fact, was well within its right to judge the credibility of the witnesses. *Thames v Thames*, 191 Mich App 299, 311; 477 NW2d 496 (1991).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Moreover, although not binding on this Court, we note that in the case of *In re Marriage of Schmidt*, 242 Ill App 3d 961; 610 NE2d 673 (1993), the Illinois Court of Appeals similarly upheld a trial court's determination that purported loans from parents to their son were actually gifts. The Court noted that a donative intent is presumed in transfers from parents to children and that the facts substantiated the trial court's finding that the transfers were gifts, not loans, because they contained no interest rate and no payments were ever made on them. 242 Ill App 3d at 968-970. In this case, although a loan agreement was executed, and at least some payments were made, no payments had been made on the loan since October 15, 1991. We therefore find that the trial court's determination was not clearly erroneous. *McMichael, supra*.

Defendant next argues that the trial court erred in failing to offset the value of the marital home at the time of judgment from the premarital value of the home. We disagree. Again, findings of fact will not be reversed unless clearly erroneous. *McMichael, supra* at 728-729.

Defendant contends that the evidence presented at trial demonstrated that defendant had an equitable interest in the marital home prior to the parties' marriage. The parties stipulated that defendant's parents purchased the home in 1981 on land contract. Thereafter, defendant paid rent to his parents for a period of time. Subsequently, a partnership was created between defendant and his mother and the property was deeded to the partnership. After the parties' marriage in 1990, defendant's mother began to gift her interest in the property to defendant and the property was ultimately deeded to plaintiff and defendant in 1996 as tenants by the entireties. Defendant maintains that the trial court erred in failing to take into account the value of the home prior to the date of the parties' marriage. However, based on the aforementioned evidence, we are not convinced that the trial court committed error in determining that the marital home was a gift to both plaintiff and defendant and that the value of the home did not require an offset. While defendant may have had an interest in the home to the extent that he was a partner with his mother, he was not entitled to full-fledged ownership rights until the property was officially deeded to plaintiff and defendant in 1996. The conveyance of the property to a limited partnership, and the subsequent gifting to defendant of his mother's majority interest in the home occurred after the parties were married. As noted by the Illinois Court of Appeals in *Schmidt, supra*, 242 Ill App 3d at 968, "[d]onative intent is presumed if the transfer was from a parent to child." The court's determination that defendant's parents intended to gift the home to both parties was supported by the evidence.

Even if this Court were to determine that the property should have been reduced by its premarital value, the ultimate distribution was fair and equitable under the circumstances. A trial court's goal in the division of marital assets should be an equitable distribution of property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). Though the division does not require mathematical equality, any "significant departures from congruence" should be clearly explained by the court. *Id.* at 114-115. In order to reach an equitable division, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health and needs, fault or past misconduct, and any other equitable circumstance. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996); *Sparks v Sparks*, 440 Mich 141, 158-159; 485 NW2d 893 (1992). The general rule with regard to property distribution is that a party's separate assets may not be invaded. *Reeves v*

Reeves, 226 Mich App 490, 494; 575 NW2d 1 (1997). However, there are two exceptions to this general rule. *Id.* The first is when “a division of the marital assets alone would have been insufficient for suitable support.” *Id.* The second is when “the other spouse ‘contributed to the acquisition, improvement, or accumulation of the property.’” *Id.* at 494-495, quoting MCL 552.401; MSA 25.136.

It was clear that the court’s goal was a fair division of the assets. Plaintiff was ultimately awarded the marital home and defendant was awarded his business. The court’s determination that plaintiff should stay in the marital home and assume the mortgage was reasonable. While the parties shared joint legal custody of their minor child, plaintiff maintained physical custody and remained responsible for his “day-to-day supervision.” Thus, awarding the home to plaintiff ensured a suitable living arrangement for the child. Had the home been considered a separate asset, there would not have been sufficient property to sustain plaintiff without selling defendant’s business.

Finally, defendant argues that the trial court abused its discretion in awarding plaintiff attorney fees. Defendant contends that, contrary to the trial court’s determination, he acted in good faith with regard to establishing a value for the property. Defendant also takes issue with the fact that the court failed to conduct an evidentiary hearing to determine the reasonableness of the attorney fees. A trial court’s decision to grant attorney fees to a party in a divorce action will not be reversed absent an abuse of discretion. *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997). We find that the trial court was within its right to award attorney fees, but agree that defendant was entitled to an evidentiary hearing with regard to the reasonableness of the fees.

In a divorce action, a trial court may award attorney fees when “it is necessary to enable the party to carry on or defend the suit.” *Hawkins, supra* at 669. Additionally, attorney fees may be granted when “the party requesting payment has been forced to incur them as a result of the other party’s unreasonable conduct in the course of the litigation.” *Id.* A party to a divorce action should not be required to invade assets for attorney fees when these same assets are being relied upon for support. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995).

Here, the trial court did not abuse its discretion in concluding that plaintiff was entitled to attorney fees. Defendant makes much of the fact that the court’s reason for granting the fees was because of defendant’s alleged unreasonable position regarding the valuation of assets. However, even if it were determined that defendant acted reasonably, plaintiff would still be entitled to attorney fees where the evidence demonstrated her inability to pay for counsel. Plaintiff at the time of trial was earning only \$7 an hour. Compared to defendant’s income, this amount was paltry. Additionally, as the trial court pointed out, the ultimate distribution of assets was almost equal. Plaintiff should not be expected to invade the assets given to her for her support in order to pay attorney fees. Therefore, an award of attorney fees was necessary in order to allow plaintiff to prosecute the suit.

While it is true that plaintiff was entitled to an award of attorney fees, defendant was likewise entitled to an evidentiary hearing regarding the reasonableness of the fees. If the reasonableness of a fee request is challenged, the court must normally conduct an evidentiary hearing. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). The burden of proof as to the

reasonableness of the fees rests on the party claiming a right to compensation. *In re Krueger Estate*, 176 Mich App 241, 249; 438 NW2d 898 (1989). A court may forego an evidentiary hearing where it has already explained the reasons for its decision and where the record has been developed sufficiently to review the issue. *Head, supra* at 113.

While the trial court did set forth its reasons for granting fees, the record was not sufficiently developed such that the award can be deemed reasonable. The only evidence of the amount of attorney fees was plaintiff's testimony that she had incurred \$22,000 as of the time of trial. There was nothing presented to support this contention. There was no breakdown of an hourly fee or the amount of time spent on the case. Defendant timely filed a motion for new trial and requested an evidentiary hearing with regard to the attorney fee issue. The trial court did not abuse its discretion in awarding attorney fees, but an evidentiary hearing should have been conducted to determine the reasonableness of those fees.

Affirmed and remanded for an evidentiary hearing consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Robert B. Burns